Application for stay denied
by Rehnquist, J. on July 22,
1983. (A-36)

RECEIVED
JUL 18 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE
UNITED STATES

HON. JUSTICE REHNQUIST

IN RE.

ELMER H. THOMASSEN,

Petitioner

No. 83-89

~~MOTION FOR A STAY OF TRIAL BELOW PENDING DISPOSITION OF PETITION FOR WRIT OF MANDAMUS AND DECLARATION OR~~ IN THE ALTERNATIVE EXPEDITED DISPOSITION
(Requires disposition before
July 27, 1983)

COMES NOW Petitioner/Defendant ELMER H. THOMASSEN and petitions this Court for an immediate stay of the trial date below which is scheduled for July 27, 1983 at 10:00 a.m. pending disposition of Petition for Writ of Mandamus filed herein on the same date as the within motion.

In the alternative, Petitioner moves for an expedited disposition of the Petition for Writ of Mandamus.

In support of said motion for stay pending disposition of the Petition for Writ of Mandamus, pentioner/defendant relies on the Petition for Writ of Mandamus, the Appendix to the Petition for Writ of Mandamus and the Declarations of Petitioner attached hereto.

In further support of the motion for a stay pending disposition of the Petition for Writ of Mandamus or in the alternative an expedited disposition of the Petition for Writ of Mandamus petitioner states the following:

1. Unless the Court grants this motions for a stay, the trial court below will require petitioner to proceed with the trial below on July 27, 1983 without competent assistance of counsel and without assistance of counsel.

2. The Petition for Writ of Mandamus is submitted for the purpose of stated therein and has merit and is not submitted for the purpose of delay and is not frivolous.

Respectfully submitted,

Jeanene Moenckmeier

Jeanene Moenckmeier
COSTANTINOU & MOENCKMEIER, P.C.
8326 Lackland Road
St. Louis, Mo.63114
(314) 428-8448

Counsel for Petitioner

STATE OF CALIFORNIA)
) SS.
COUNTY OF ORANGE)

DECLARATION OF ELMER H. THOMASSEN

I ELMER H. THOMASSEN, declare as follows:

1. I am the petitioner in the Petition for Writ of Mandamus filed herein.

2. I am unable to request relief in the court below because the District Court has ordered that I may not speak in the District Court as long as I am represented by an attorney and the Hon. Francis C. Whelan, Judge has ordered that I may not lodge or file any papers with the clerk.

3. I first waited for my Deputy Federal Public Defender to file the Motion for a stay in District Court below and/or in the Ninth Circuit and for him to file a Petition for Writ of Mandamus; however, my Deputy Federal Public Defender, Brian Q. Robbins refused to file for either a stay or for a Writ of Mandamus. Mr. James Dunn, Federal Public Defender in Los Angeles also refused to file the above mentioned papers for me in either the Court below or in the Ninth Circuit. Further the Deputy Federal Public Defender, Brian Robbins, refuses to file any of the motions I have requested him to file.

4. It is urgent that this Court expedite my motion for a stay because my trial is cheduled for July 27, 1983 and the Honorable Francis C. Whelan has ordered that there will be no excludable time for motions. The Judge has stated in open court on more than one occasion that he would grant no excludable time for motions and would insist on maintaining the trial date.

5. I have ineffective assistance of counsel in the preparation of the trial below as follows: My court-appointed attorney refuses to file any motions on my behalf, refuses to respond to any of my letters, has refused to file for a stay or petition for writ of mandamus. I am unable to communicate with my attorney concerning my case because of irreconcilable differences and because he is unwilling to talk to me when I visit his office.

6. I have ineffective assistance of counsel because my court-appointed attorney Brian Robbins is not capable of representing me in a criminal tax trial.

7. The only alternative the court has offered me to being represented by Brian robbins is to represent myself.

8. My attorney refuses to file the necessary pre-trial motions and my trial is only about two weeks away.

9. The statements of fact in the attached Declaration which was orginally submitted to the Ninth Circuit in support of my Motion for a Stay pending disposition of Petition for Writ of Mandamus are true and correct.

10. The foregoing statements of fact are true and correct to the best of my knowledge and belief and made under penalty of perjury. Executed in Newport Beach, California on July 11, 1983.

E H Thomassen

Elmer H. Thomassen

DECLARATION OF ELMER H. THOMASSEN IN SUPPORT OF APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR WRIT OF MANDAMUS:

I, ELMER H. THOMASSEN, declare:

1. I am the defendant in the case below in U.S. District Court for the Central District of California in Los Angeles, U.S. v. Elmer H. Thomassen, CR 83-271, Francis C. Whelan presiding.

2. The purpose of this declaration is to support my application for a stay pending disposition of my Petition for Writ of Mandamus.

3. I have filed this motion for a stay and the corresponding Petition for Writ of Mandamus as quickly as possible; however, the following factors have prevented me from applying for this earlier and have prevented me from requesting a stay in the court below:

a. On June 2, 1983 while visiting Deputy Federal Public Defender Brian Q. Robbins at his office at 312 N. Spring Street, Los Angeles, Calif. 90012 the car which I was driving was stolen from where it was parked near the I.R.S. headquarters. All of my documents related to this case were stolen and needed to be replaced before I could prepare and file this Motion and the Petition for Writ of Mandamus. (Please see Victim's Report, Appendix to Petition for Writ of Mandamus, hereafter designated "App.," App. at A-132)

b. The transcript for the hearing on May 31, 1983 was not ready until just recently. The transcript was necessary for this Court to understand my case.

c. I first waited for my Deputy Federal Public Defender to file the Motion for a Stay in District Court below and/or in the Ninth Circuit and for him to file a Petition for Writ of Mandamus; however, my Deputy Federal Public Defender, Brian Q. Robbins refused to file for either a stay or for a Writ of Mandamus. Mr. James Dunn, supervisor of Federal Public Defenders in Los Angeles also refused to file the above mentioned papers for me in either the court below or in this Court. (See Letter to Brian Q. Robbins, App. at A-129)

d. The master-file in the clerk's office below was weeks behind, so I had to wait until the master file was available to prepare this motion and Petition for Writ of Mandamus.

4. It is urgent that this Court expedite my motion for a stay because my trial is scheduled for June 28, 1983 and the Honorable Francis C. Whelan has ordered that there will be no excludable time for motions. (See Docket entry No. 20 for 5/18/83, App. at A-4 and Docket entry for 5/31/83, App. at A-7). The Judge has stated in open court on more than one occasion that he would grant no excludable time for motions and would insist on the June 28, 1983 trial date, even if it was necessary to interrupt another trial to impanel the jury.

Judge Whelan refuses to permit the trial to be set for a date later than June 28, 1983 because of a reported conflict with a seminar and/or vacation time.

5. I have made the following attempts to obtain competent counsel to represent me at my trial:

a. On April 25, 1983, I requested that the court grant me a continuance to enable me to retain an attorney of my choice because I had no confidence in the Federal Public Defender's Office because of their lack of knowledge and experience in tax law and criminal tax trials. (See Docket entries for April 25, 1983 and May 9, 1983 at A-1, A-2 and Criminal Minutes for April 25, 1983 and May 9, 1983, App. at A-9 and A-10).

b. On May 9, 1983 I filed a "Motion for an Order to Pay for an Experienced Criminal Tax Attorney of Defendant's Choice or, in the alternative, Order the Government to Release Property held under lien, Points & Authorities and Declaration." (App. at A-37) On May 9, 1983 the Court denied the motion and on May 31, 1983 the Court again denied the motion on reconsideration. (See Docket entries for May 9, 1983, App. at A-6 & A-7, and Criminal Minutes for May 9, 1983, App. at A-10, and Transcript of May 31, 1983, App. at 28.)

c. The facts stated in my declaration attached to my"Motion for an Order to Pay for an Experienced Criminal Tax Attorney...." filed below on May 9, 1983 are incorporated herein by reference, and are true and correct. (See Declaration attached to Motion, App. at A-40).

d. I have contacted the following attorneys to represent me in my trial; however, I was unable to retain my attorney of choice because the attorneys requested between $15,000.00 and $20,000.00 retainers in advance:

Robert Chatterton, Orange County
Arthur Tranakos, Atlanta, Georgia
Donald Macpherson, Phoenix, Arizona
M. D'Amico, San Diego, California
Earl Durham, San Diego, California

(Please see Declaration, App. at A-40 and Declaration attached to Motion for Continuance, filed May 9, 1983, App. at A-90).

e. I am unable to obtain loans for attorneys' fees because all of my property has I.R.S. liens against it, from judgment before the U.S. District Court below (CV 78-1731MR).

f. I have attempted to obtain loans from the following people and others but have been been unsuccessful in obtaining a loan:

George W. Thomassen (See App. at A-130, A-131)
James Saline (See App. at A-42)
Robert G. Costantinou (See App. at A-43)

George W. Thomassen has specifically refused a loan to me because liens for my assessed taxes have been attached to his real property in California. (See Letter, App. at 131 and Telegram, App. at A-130).

g. Deputy Federal Public Defender Yolanda Gomez suggested to the Court in her motion filed May 18, 1983 (App. A-95) and argued on May 18, 1983 (Transcript of 5-18-83, App. at A-20) that the Court appoint someone from the indigent panel since "There are attorneys on the indigent panel who are familiar with tax law and have a background in it." (See Motion at p. 6, App. at A-100).

h. On May 9, 1983 I filed a Motion for a Continuance in Order to Obtain [competent] Assistance of Counsel. (See Motion, App. at A-88); however, my motion was denied on the

same date. (Docket entry No. 14 on May 9, 1983, App. at A-3 and Criminal Minutes for May 9, 1983, App. at A-10). The Court further indicated on May 18, 1983 that "speedy trial excludable time finding would not be made by court based on motions filed." (See Docket entries for 5/18/83, docketed 5/20/83, App. at A-4).

i. I have asked Brian Q. Robbins, my Deputy Federal Public Defender, in person and in writing to file a writ and/or other papers in the Ninth Circuit to protect my rights to due process regarding the denial of my motions for competent assistance of counsel (See Letter to Mr. Robbins, App. at A-129); however, Mr. Robbins has refused to file for any writ or for a stay in conjunction with the writ.

6. The following facts support my position that I have been furnished with inadequate and incompetent counsel, and denied effective assistance of counsel for my criminal tax trial:

a. Deputy Public Defender Yolanda B. Gomez appeared specially as a courtesy to the court on April 25, 1983; but she had refused to file any pre-trial motions or assist me with the motions that I filed while I was without counsel due to no fault of my own. Ms. Gomez also was ordered to appear at my so-called arraignment on May 9, 1983, and again refused to assist me with my pretrial motions or even read them. (See Docket entries for 5/25/83 and 5/9/83 at A-1 to A-3; and Letter to Ms. Gomez, App. at A-107).

b. Ms. Gomez requested that she be relieved from handling my case because she was not competent to handle a case of this magnitude. (See Transcript of 5-18-83, App. at

A-22 to A-24, and Motion to Ms. Gomez, App. at A-95).

c. Ms. Gomez' Motion for Relief was first denied by the Court on May 18, 1983; however, because Ms. Gomez had a calendar conflict, Deputy Federal Public Defender Brian Q. Robbins was substituted for Ms. Gomez on May 19, 1983 (Docket Entry No. 19, App. at A-4; Transcript of 5-18-83, App. at A-20 to A-24; Criminal Minutes 5-19-83, App. at A-11).

d. Mr. Robbins informed me immediately after his appointment that he has had only one other criminal tax case, but has not completely tried any and has not won any in trial.

e. Since being appointed my counsel on May 19, 1983, Mr. Robbins has adamently refused to file, research, or argue any of my pretrial motions which I filed when I was in propria persona; likewise, he has refused to file any of the trial motions I have prepared for him to file since his appointment. (See letters to Mr. Robbins, App. at A-107 to A-129).

f. At the proceeding in Court on May 18, 1983, when Mr. Robbins was appointed to represent me, the Court ordered that I would not be allowed to speak in court again, and if I attempted to do so, that my bond would be withdrawn and I would be placed in immediate custody. (Referred to in Transcript of 5-31-83, App. at A-28, lines 1-3; but not included in partial Transcript of 5-18-83, App. at A-20).

g. At the proceeding in Court on May 18, 1983, the Court ordered me to "Quit filing papers. I am going to instruct the clerk if you are not going to represent yourself to quit accepting motions from you." (Transcript of 5-18-83 at p. 5, App. A-24).

h. At the proceeding in Court on May 31, 1983, Mr. Robbins refused to argue my motions which had been filed prior to appointment of my court appointed counsel. He stated it was the policy of the Federal Public Defender's Office not to permit the Deputy Federal Public Defender to argue defendant's pro se motions. (See Transcript of 5-31-83, App. at A-27)

i. Mr. Robbins did ask the Court if I could speak to my motions on May 31, 1983, but the court refused to allow me to speak. (Transcript of May 31, 1983, App. at A-27).

j. At the hearing on May 31, 1983, Mr. Robbins failed to ask for the grounds used by the Court for the denial of pre-trial motions when they were before the Court for hearing or reconsideration. Therefore, my pre-trial motions have gone unargued so far at the time they were before the Court. (Transcript of 5-31-83, App. at A-27 to A-31).

k. Mr. Robbins did not advise me that the U.S. Attorney had filed a response to my motions, in spite of the fact that he expected me to argue the motions myself (Transcript of 5-31-83, App. at A-27), and in spite of the fact that the responses had been hand delivered to him on May 27, 1983, and filed on May 27, 1983. (See Docket entry on May 27, 1983, App. at A-6). The docket entry on May 27, 1983, is in error in stating that a "reply to answer to motion to dismiss" was filed. Mr. Robbins made no reply to the U.S. Attorney's responses to my motions.

l. I did not find out until June 2, 1983, that the U.S. Attorney had filed responses to my motions scheduled to be heard on May 31, 1983, because the computer print-out of the current docket entries was not up-dated on May 31, 1983. When I checked with the docket clerk and had her run a print-out of

the current docket entries on May 31, 1983, there was no entry after May 19, 1983; thus, there was no way that I could have known that the U.S. Attorney had filed responses to my pre-trial motions on May 27, 1983, since Mr. Robbins chose not to advise me of the U.S. Attorney's responses, even though he had been personally handed them on May 27, 1983 by the U.S. Attorney.

m. I did not receive the up-to-date computer print-out of the docket until June 2, 1983; and I was shocked to see that the U.S. Attorney had apparently responded to my four motions scheduled for hearing or rehearing on May 31, 1983, and had filed responses on May 27, 1983. I immediately contacted Mr. Robbins on June 2, 1983, at about 5:00 p.m., and confronted him with the docket sheet entry of May 27, 1983. (See docket entry, App. at A-6). Mr. Robbins advised me to wait and he would get a copy of the U.S. Attorney's responses to my motions. I waited for Mr. Robbins to return with the responses until nearly 6:00 p.m. At that time, I was dumbfound when finally Mr. Dunn, the Federal Public Defender, who is Mr. Robbin's supervisor, told me that Mr. Robbins had certainly gone home and that it would be useless for me to wait any longer. (See Lobby Registration Log, App. at A-133). Mr. Robbins not only did not return with the U.S. Attorney's responses, but contemptuously left me waiting in pain on crutches while he went home. It was evidently during this time that car which I had been driving was stolen where it was parked with my handicap emblem on it near the I.R.S. headquarters; the car contained my papers concerning this case and two typewriters. (See Victim's Report, App. at A-132; and see Docket entries for 5-27-83 at A-6 which were not on the computer on May 31, 1983).

n. I have attempted to protect my rights by filing and/or lodging my own motions when Mr. Robbins refused to file motions for me; however, because of Judge Whelan's order to the Clerk not to accept my motions, I have no means of protecting my rights in the court below. The foregoing statement is supported by the following facts:

For example, immediately after the court hearing on May 19, 1983, which was exactly ten days following my so-called arraignment, I asked Mr. Robbins if he would file a motion that I had prepared for a Bill of Particulars. He stated that he would not file it for me. Since I could not file the motion myself due to Judge Whelan's order silencing me and preventing me from filing any papers, (See Transcript of 5-18-83, App. at A-24) I asked Mr. Robbins if I could lodge the motion for a Bill of Particulars, as the Court had not ordered me not to lodge any papers. Though Mr. Robbins refused to do so, he suggested that I could lodge the motion for a Bill of Particulars myself. This I proceeded to do by first serving Assistant U.S. Attorney Jeffrey Niesen, who was the assistant U.S. Attorney assigned to my case. Then I tried to lodge the motion, but the regular court clerk refused to allow me to lodge the motion, stating that the Court had ordered her to accept no papers from me. I then proceeded to Judge Whelan's courtroom and presented the motion for a Bill of Particulars to Judge Whelan's clerk. She also refused to accept the motion for lodging, stating that the Court had ordered me not to lodge or file any papers. I explained to her that even the Court had not ordered me to stop lodging any documents for the record. (See Transcript of 5-18-83,

App. at A-24).

o. I have both orally and in writing requested Mr. Robbins to correct the record and docket entries which have numerous errors which are prejudicial to me, but he has refused to do so. (See letter to Mr. Robbins, App. at A-112) The record and entries have errors as follows: (not complete)

1. Item No. 2 under date of April 18, 1983 on the docket (Docket entry, App. at A-1) is in error in that no arraignment was actually held on that date and it is further in error in that Public Service Officer D. Elias misled the Court when he said I had been contacted, because he had never spoken to me, nor was I aware of any scheduled Court appearance. I was not aware of the indictment until my wife called me out of the state where I was attending a continuing medical education meeting, on or about April 22, 1983. (See Docket entry No. 2 on 4-18-83, App. A-1). I first saw the indictment (See Indictment, App. A-13) on Friday, April 22, 1983, after I signed for certified mail at the post office.

2. Docket entry, item No. 4, (App. at A-1) and the Minute Order for April 25, 1983, (App. at A-9) show errors, as follows:

a. I did not inform the Court that I could not hire private counsel. I stated that I would attempt to hire private counsel. (See lines 5 and 6 of the minute order, App. at A-9). (See also Motion, App. A-44)

b. Line 6 of the minute order of April 25, 1983, states that I refused to complete CJA 23, Financial Affidavit. I did not refuse to complete the Financial Affidavit; I stated I could not fill it out without the assistance of counsel, which the court refused to grant me for this purpose. (App. at A-9)

c. Likewise, I did not refuse to sign the P/R Bond. I merely requested assistance of counsel for this step of the proceeding, which was not granted by the Court.

d. Finally, I was assigned to Judge Kenyon on the 25th of April, 1983, but was subsequently assigned to Judge Francis C. Whelan.

3. Item No. 6 on the docket (App. at A-2) under date of April 26, 1983, shows Motion No. 1 was filed on April 26, 1983, when it was actually filed and so stamped as filed on April 25, 1983 (App. at A-33), when I was in propria persona. The document which was filed on April 26, 1983 was a Supplement and Memorandum of Points and Authorities and Declaration which was not the original motion. (App. at A-2)

4. On May 9, 1983, a so-called arraignment was held and the court first plead me "guilty" in open court and subsequently changed the plea to "not guilty." Contrary to the docket entry for May 9, 1983 (App. at A-3) and Criminal Minutes for May 9, 1983 (App. at A-10), only the first count of the indictment was read to me and that count I did not understand.

5. On line 18 of Item 14 on the docket for May 9, 1983, the docket shows that I entered a plea of "not guilty." This entry is in error, as I made no such plea. (Docket, App. at A-3) The Court entered a plea for me.

6. On May 18, 1983, the docket print-out shows that I lodged supplemental defendant's counsel (relief motion), in propria persona. Then the statement is made: (Placed in file not used.) This is in error. The motion was used by the Court. As a matter of fact, the Court received a copy of this motion supplement and referred to it in the hearing on May 18, 1983. (See Docket, Item No. 18, lines 1 and 2, App. at A-4; and Transcript of 5-18-83, App. at A-22).

7. Also, on May 18, 1983, Docket Item No. 19, lines 4 and 5 (App. at A-4), states: "Crt ords clerk of crt not to accept any documents submitted by Dr. Thomassen in pro per, for lodging for filing." (emphasis added) The Court did not order me not to lodge any papers, but the court clerk added the word "lodging." (See Docket Entry No. 19, App. at A-4 and Transcript of 5-18-83, page 5, line 1, App. at A-24).

8. Docket Entry for May 27, 1983 (App. at A-6) is in error. It states: "Reply to answer to motion to dismiss" (Motion #3). No answer was filed and no reply was filed. Only a response was filed by the United States.

STATE OF CALIFORNIA)
) SS.
COUNTY OF ORANGE)

I, Elmer H. Thomassen, declare under penalty of perjury that the foregoing statements of fact in the Declaration of ELMER H. THOMASSEN in Support of Application for Stay Pending Disposition of Petition for Writ of Mandamus are true and correct. Executed on June 17, 1983 in Newport Beach, Calif.

E H Thomassen

Elmer H. Thomassen

IN THE
SUPREME COURT OF THE
UNITED STATES

IN RE:	)	
	)	
ELMER H. THOMASSEN,	)	No. _____
	)	
Petitioner	)	AFFIDAVIT OF SERVICE
	)	

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

I, JEANENE MOENCKMEIER, after being duly sworn, depose and state the following:

1. I am a member of the Bar of Missouri and my office address is 8326 Lackland Road, St. Louis, Mo. 63114 I am a resident of the County of St. Louis, State of Missouri.

2. On July 14, 1983 three copies of the Petition for Writ of Mandamus and three copies of the Appendix to the Petition for Writ of Mandamus and one copy of the Motion for a Stay were mailed to the following via express mail:

UNITED STATES ATTORNEY
BY: Jeffrey Niesen, AUSA
1200 United States Courthouse
312 N. Spring Street
Los Angeles, Calif. 90012

Hon. Francis C. Whelan
U.S. District Judge
U.S. District Court for the
Central District of California
312 North Spring Street
Los Angeles, Calif. 90012

3. The foregoing statements of fact are true and correct and made upon my personal knowledge.

Jeanene Moenckmeier
Jeanene Moenckmeier

Subscribed and sworn to before me this 14th day of July, 1983.

Robert G. Costantinou
NOTARY PUBLIC

My commission expires:

ROBERT G. COSTANTINOU
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES DEC. 26, 1986
ST. LOUIS COUNTY